SUPREME COURT, U. S.

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MICHAEL RODAK, JR.

No. 73-5925

Supreme Court of the United States

October Term 1973

TERRY DEAN EATON
Petitioner

VERSUS

CITY OF TULSA, OKLAHOMA
a municipal corporation
Respondent

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

WALDO F. BALES, *City Attorney*
By: David Nelson
Assistant City Attorney
200 Civic Center
Tulsa, Oklahoma 74103

Richard J. Kallsnick
Assistant City Prosecutor

WAYNE R. SCOTT CO. TULSA, OK. 74120
507 S. QUAKER ● (918) 587 7806

HARVEY SHARP OKLA. CITY, OK. 73102
407 REGENCY TOWER ● (405) 232 0963

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QUESTION FOR REVIEW

Petitioner in his Petition states:

"The question presented for review is whether or not the use of a vulgarism in open Court constitutes direct contempt *per se*."

Respondent cannot agree that this is a fair statement of the question presented for review. The charge of "Direct Contempt" was not based entirely on the mere use of a vulgarism in the presence of the Judge while Court was in session. There were certain overtones or implications which lend additional support to the charge.

In the "Order Affirming Conviction for Contempt", the Oklahoma Court of Criminal Appeals made the following statement:

> "Counsel submits in his brief the expletive used by defendant 'chicken shit' a vulgarism does not constitute direct contempt per se. We find the expletive to not be the only comment in question. After studying the entire portion of the record above reproduced, we note that the record clearly manifests in its entirety discourteous responses to the trial court upon the trial court's observations made during the course of trial. In *Champion v. State*, Okl. Cr., 456 P.2d 571 (1969), this Court held such discourteous responses are sufficient to warrant a citation for contempt. Coupling defendant's expletive with the discourteous responses it is this Court's opinion there was sufficient evidence upon which the trial court could find defendant was in direct contempt of court."

REASONS FOR DENYING THE WRIT

(1) No Federal Constitutional questions raised.

Petitioner, in his Petition, attempts to limit the issue to whether or not the use of a vulgarism in open court constitutes direct contempt *per se*. Petitioner then submits

that the trial court and the Oklahoma appellate court found Petitioner's utterance to be outside the constitutional protections of the First and Fourteenth Amendments to the United States Constitution.

Respondent respectfully submits that Petitioner is incorrect in his narrow interpretation of the issue. As the trial court and the appellate court correctly found, the use of the mere vulgarism is not the sole basis for the contempt citation. The appellate court pointed this out in its order affirming the contempt conviction wherein it found, after reviewing the transcript, that the expletive "chicken shit" was not the only comment in question; and that coupling that expletive with the other discourteous responses, there was *sufficient evidence* upon which the trial court could find Petitioner in direct contempt of court. The appellate court in its "Order Overruling Petition for Rehearing and Directing Issuance of Mandate", directed counsel for the Petitioner to observe the separate opinion of *In Re Little*, 404 U.S. 553, 30 L.Ed. 2d 708, 92 S.Ct. 659; and *Champion v. State*, Okl. Cr., 456 P.2d 571 (1969).

The foregoing premises considered, it is respectfully submitted that in light of all the evidence, Petitioner's conduct or utterances during the trial were sufficient to merit his being held in direct contempt of court.

(2) Case law is clearly opposed to Petitioner's position.

Respondent contends that the existing case law is

clearly opposed to the position taken by Petitioner. Following is an examination of some of the existing authorities and case law dealing with contempts of court, as set out in Respondent's Brief to the Oklahoma Court of Criminal Appeals, at page 6:

> "In 17 C.J.S., *Contempt*, §3d (p.21), it is stated that the manner in which an act is done, or in which words are spoken, may be an important element in determining whether or not it or they constitute contempt. Under this section of C.J.S. we also find the following language:
>
> > 'Acts or words which in themselves may be innocent may be done or spoken in such a manner as to constitute a contempt, and it has been stated that it is not so much the nature of the act itself which determines contempt, but rather the manner in which it is committed and its resultant injury to the dignity and authority of the court. Hence, in determining whether language used is in contempt, regard must be had not only to the words but to the surrounding circumstances, the connection in which they were used, the tone, the look, the manner and the emphasis. See *State v. Johnson*, (Washington 1933) 18 P.2d 35.'
>
> "In *State v. Caffrey*, 422 P.2d 307 (Washington 1966), the Washington Court stated: (p.308)
>
> > 'Much depends upon the manner, expression and attitude of the party adjudged in contempt in addressing the court or other person in using the language held improper. A finding of contempt is not necessarily based alone upon the

language used. The contempt may largely exist in the manner in which the words are spoken . . . .'

° ° °

"Defendant, Eaton, in his Petition makes reference to the case of *In Re Little*, 404 U.S. 553, 30 L.Ed.2d 708, 92 S.Ct. 659 (1972). In the Opinion of that case appears the following language:

'The order also recites, "As the Defendant was being removed from the courtroom by the deputy sheriff (following the contempt adjudication), he spoke out and called the undersigned Presiding Judge a m---- f----." This language in a courtroom is, of course, reprehensible and cannot be tolerated. But this was not relied upon by either the District Court or the Supreme Court for the conviction and sentence and the State defends the conviction in this court without any reference to it. We therefore also lay it aside for the purpose of our decision.'

"In a separate opinion, Mr. Chief Justice Burger, with whom Mr. Justice Rehnquist joined, concurring, stated:

'I agree with the Court's disposition of the case but something more needs to be said.

'A contempt holding depends in a very special way on the setting, and such elusive factors as the tone of voice, the facial expressions, and the physical gestures of the contemnor; these cannot be dealt with except on full ventilation of the facts. Those present often have a totally different impression of the events from what would appear even in a faithful transcript of the record. Some measure of the flavor of what really occurred in

the episode, and of the petitioner's attitude and demeanor, how his spoken words impressed those present, may be gleaned from the events and utterances described in the court's per curium opinion.

'The North Carolina Court is, of course, free to promptly summon this petitioner before it and, observing the strictures of *Mayberry v. Pennsylvania*, 400 U.S. 455, 27 L.Ed.2d 532, 91 S.Ct. 499 (1971), issue process requiring him to show cause why he should not be held in contempt for the conduct and utterances following the contempt adjudication.'

From the above language it is apparent that Mr. Chief Justice Burger and other members of the United States Supreme Court do not feel that a trial court should have to tolerate that type of conduct or language.

Petitioner for his argument also relies on the case of *Cohen v. California*, 91 S.Ct. 1780 (1971).

" . . . . The *Cohen* case, is distinguishable from the case at issue in that the Defendant in the *Cohen* case was *not in court* but was walking through the courthouse corridor wearing the jacket bearing the words 'Fuck the Draft'. Also the *Cohen* case is distinguishable in that the Defendant was *not* charged with contempt of court but was prosecuted under the California Penal Code, §415, which relates to disturbing the peace and quiet of any neighborhood.

"In the *Cohen* case, *supra*, the Court makes the following statement: (p. 1785)

' . . . . The First and Fourteenth Amendments

have never been thought to give absolute protection to every individual to speak whenever or wherever he pleases or to use any form of address in any circumstances that he chooses.'

"Therefore, although the *Cohen* case is distinguishable from the case at issue, the United States Supreme Court in that case has indicated that the First and Fourteenth Amendments do not afford an absolute protection in every circumstance."

The Oklahoma Court in *Champion v. State*, Okl. Cr., 456 P.2d 571 (1969), stated: (p. 572)

"As we view the entire record, counsel's uncalled for remark to the Judge, while he testified voluntarily in behalf of his Motion for Continuance was sufficient alone to warrant the direct contempt.

"In this instance, counsel did not properly respond to the question put to him by the District Attorney and when admonished by the Judge that he must answer the question, his discourteous response to the Judge's admonishment — *standing alone* — was sufficient to warrant the citation. (emphasis added)"

The foregoing premises considered, it is respectfully submitted by Respondent, that these legal authorities support our argument that Petitioner's manner, expression and attitude, when considered along with the language he used in the courtroom, was sufficient, after a show cause hearing, to warrant the trial court's finding him in direct contempt.

CONCLUSION

The Oklahoma Court of Criminal Appeals, upon reviewing the transcript, held that there was sufficient grounds for the trial court's finding Petitioner in direct contempt of court. It found the case law to be clearly opposed to the position proposed by Petitioner.

For the above reasons, we submit that the decision of the appellate court was correct. The Respondent respectfully prays that this Honorable Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

David Nelson
Assistant City Attorney
200 Civic Center, Room 1012
Tulsa, Oklahoma 74103

Richard J. Kallsnick
Assistant City Prosecutor

CERTIFICATE OF SERVICE

I, David Nelson, do hereby certify that three (3) full, true and correct copies of the above and foregoing Brief in Opposition to Petition for a Writ of Certiorari to the Court of Criminal Appeals of the State of Oklahoma was mailed, with postage thereon fully prepaid, to C. Ron Martin, Attorney at Law, 912 Mayo Building, Tulsa, Oklahoma, 74103, Attorney for Petitioner; and the Honorable Larry Derryberry, Attorney General for the State of Oklahoma, State Capitol Building, Oklahoma City, Oklahoma, on this ____ day of January, 1974.

David Nelson
Assistant City Attorney